Filed 2/19/16 P. v. Diaz CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RODOLFO PACHUCHA DIAZ, Defendant and Appellant.	G051435 (Super. Ct. No. 99WF0380) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Kazuharu Makino, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed and remanded with directions. Request for judicial notice. Granted.

Paul J. Katz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Rodolfo Pachucha Diaz appeals from an order denying his application to have his felony second degree burglary conviction redesignated as a misdemeanor under Penal Code section 1170.18, subdivision (f) (section 1170.18(f)), enacted in 2014 as part of the "Safe Neighborhoods and Schools Act" (Proposition 47).

In 1999, defendant pleaded guilty to second degree burglary in violation of Penal Code sections 459 and 460, subdivision (b), a felony. Paragraph 21 of the guilty plea form stated: "On 2-7-99 In O.C., I unlawfully aided + abetted the entry of a commercial building w/intent to committed larceny therein."

In 2014, defendant filed an application to have his felony burglary conviction redesignated as a misdemeanor under section 1170.18(f). His application stated: "Defendant was previously convicted and sentenced for the following felony offense: Penal Code § 459-460(b) [second degree vehicle burglary] which should be recast as misdemeanors under Proposition 47." (Bracketed text in original.)

At the hearing, the court noted the People's "opposition is based on the fact that it's an automobile which would mean it's probably not a commercial business during regular business hours." Defense counsel agreed: "It's not. It is an auto burg." The court responded, "Okay, so then the petition is denied."

On appeal, defendant contends the court denied his petition, based on a mistaken belief that his underlying conviction was for burglarizing a vehicle rather than a commercial building. Defendant requests that we reverse and remand for a new hearing, to be conducted based upon the correct understanding of the underlying conviction. The Attorney General concedes the mistake and agrees we should remand for a new hearing.

The court was understandably mistaken about the underlying conviction. Further, there is no doubt that mistake was material, because commercial burglary of property worth $950 or less is an enumerated felony theft offense which may be redesignated and resentenced as misdemeanor shoplifting under Proposition 47, while vehicle burglary is not. (Pen. Code §§ 1170.18, subds. (a), (b) & (f), 459.5, subd. (a).)

Under these circumstances, it is appropriate for us to reverse and remand for a new hearing under section 1170.18(f). However, we decline the parties' invitation to go further and address in the first instance in this appeal, the question of who will bear the burden of proving on remand whether the value of the property taken was $950 or less. This question was not litigated in the trial court and it is not properly before us.

The postjudgment order is reversed, and the matter is remanded for a new hearing under section 1170.18(f). Defendant's request for judicial notice of the court file pertaining to his underlying conviction is granted. (Evid. Code, §§ 452, subd. (d), 459.)

THOMPSON, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.